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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Amendment of Section 73.622(b))
Table of Allotments)
Digital Television Broadcast Stations)
(Kingston, New York))

MM Docket No. 00-121
RM-9674

To: The Commission

APPLICATION FOR REVIEW

1. WKOB Communications, Inc. ("WKOB Communications"), licensee of WKOB-LP, New York, New York (Facility ID 51441), hereby requests review and reversal by the full Commission of the *Report and Order*, 17 FCC Rcd 1485 (Med. Bur. 2002), in the above-captioned proceeding and the subsequent *Memorandum Opinion and Order* denying reconsideration, DA 02-1776, released July 29, 2002 ("MO&O"), both issued by the Video Division of the Media Bureau ("Video Division"). The Video Division granted a petition by WRNN-TV Associates Limited Partnership to change the digital television ("DTV") allotment for WRNN-TV, Kingston, New York, from Channel 21 to Channel 48.¹ The Video Division's decision must be reversed, because it erred in three respects: (a) its analysis ignored the explicit directive of the full Commission directive to minimize the impact of DTV allotment changes on low power television ("LPTV") stations, thus acting beyond the scope of the Video Division's delegated authority; (b) it justified its action by an erroneous reading of a subsequent Commission Order; and (c) it acted contrary to the public interest because the proposal as implemented by

¹ WKOB Communications filed a Motion To Stay the effective date of the *Report and Order*, which the Video Division held was rendered moot by its denial of the Petition for Reconsideration.

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WRNN will result in the termination of WKOB-LP's on-air operations and will increase, rather than decrease, interference to other stations.

BACKGROUND

2. WKOB-LP is currently licensed to operate on Channel 53, at New York, New York. Due to predicted interference to the digital Channel 53 allotment assigned to WFUT-DT in Newark, New Jersey, WKOB Communications filed a displacement application on June 1, 1998, to move to Channel 48, which was determined to be the only available channel in the crowded New York market that WKOB-LP could reasonably use. The displacement application was found to be mutually exclusive and was placed in Auction No. 25. As there was no other channel available, WKOB Communications was forced to bid high and ultimately bid \$1.269 million to secure Channel 48. See FCC File No. BPTTL-JG0601NK (granted March 28, 2000).

3. WKOB Communications filed comments and reply comments in this proceeding, emphasizing the devastating effect that the proposed channel reallocation would have on WKOB-LP; it would essentially destroy WKOB-LP and put the station out of business. WKOB Communications pointed out that the apparent true motive behind WRNN's petition was to enable the licensee to relocate the station's transmitter nearly 49 kilometers south of Kingston, the community of license, and 67 kilometers south of the station's initially authorized transmitter site. By virtue of this move, WRNN-DT's signal would penetrate the New York City market, allowing the station become a *de facto* New York metropolitan area station instead of one primarily serving Kingston. The Video Division held that WKOB Communications' concerns need not be considered and that WRNN would have to protect WKOB-LP facilities only if WKOB-LP received or were eligible for Class A status. See *MO&O* at para. 6. Because WKOB-LP had been denied Class A

eligibility, the Video Division granted the WRNN's rulemaking request to change to DTV Channel 48 without further consideration of the impact on WKOB-LP.²

ARGUMENT

A. The Video Division's Decision Was Contrary to Commission Precedent and thus Beyond the Scope of its Delegated Authority.

4. The full Commission has spoken directly to the issue of considering the impact of DTV allotment changes on LPTV stations. While LPTV stations must yield if necessary to ensure that all eligible full power stations are able to operate in the digital mode, there must be a clear public interest benefit if a station that already has a viable DTV allotment wishes to change it at the expense of an LPTV station. *See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, ("Advanced TV Systems")12 FCC Rcd 14588, 14652-53 (1997), *on reconsideration*, 13 FCC Rcd 7418 (1998). The Commission's words are explicit: that it "will review all requests for modification of the DTV Table for their impact on low power stations." *Id* at 14671 [emphasis added].

5. The WRNN proposal from the outset disregarded WKOB-LP completely, and the Video Division did the same. There was never a technical reason given as to why the Channel 48 reallocation was necessary except for WRNN's claims that it would reduce interference and provide service to more people. However, the initial gain in service that was proposed by WRNN was substantially reduced when WRNN modified its technical proposal to specify a highly

² WKOB Communications has filed a Petition for Reconsideration of the denial of its Class A application, File No. BLTTA-20010712ACE (DA-1227), which petition remains pending. If the Class A application is ultimately granted, there is no dispute that WRNN will have to protect the WKOB-LP Channel 48 facilities.

directional antenna. Further doubt was raised as to the purported “benefits” of the WRNN reallocation because the population gain arises not from a substantially larger service contour but from the incursion into the densely populated New York City market, which is already fully served by a multiplicity of stations.

6. The interference reduction benefit also disappeared as a result of WRNN’s transmitter move to the south in its application for construction permit (BPCDT-20020130AAQ), which the Video Division granted on August 16, 2002. The Video Division ignored the construction permit application and instead analyzed the proposal based on a theoretical reference point which WRNN never intended to use and in fact will not use.

7. “It is axiomatic that a delegated authority decision cannot conflict or otherwise reverse the decision of a full Commission.”³ Yet that is what happened here. The Video Division ignored the Commission’s directive to consider impact on LPTV stations, and it compounded the error by basing its decision on a factual scenario that would never be implemented.

B. The Video Division Relied on a Policy Change the Commission Never Made.

8. The Video Division justified its decision to ignore WKOB-LP’s situation by stating that the Commission modified the *Advanced TV Systems* policy when it adopted its Class A rules⁴ and that the current policy is that only Class A stations, and not LPTV stations, are entitled to any consideration at all in DTV allotment proceedings. That is simply not so; the words in the *Class*

³ See *Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, DA 02-1021 at para. 6 (WTB, rel. August 21, 2002).

⁴ *In the Matter of Establishment of a Class A Service*, 15 FCC Rcd 6355 (2000), clarified on recon., 16 FCC Rcd 8244 (2001) (“*Class A R&O*”).

A R&O do not say what the Video Division interpreted them to say. The Class A rule making addressed only the protection to be afforded to Class A stations. The *Class A R&O* stated: "The CPBA requires the Commission to preserve the service areas of low power television licensees pending the final resolution of Class A applications." *Class A R&O* at para. 36. The words "low power television" simply are not there, and it is not reasonable to interpret the rules on Class A stations, which were adopted to implement a specific statute, as affecting LPTV stations, which are not addressed in that statute.

9. WKOB Communications is not arguing that WKOB-LP deserves the same degree of protection afforded by the statute to Class A stations. However, the Video Division was wrong in interpreting the Class A rules as relieving it completely of any obligation to evaluate the devastating impact the DTV reallocation would have on WKOB-LP and to weigh it against the lack of real-life public interest benefits from the DTV allotment change. Even if the Video Division believed that such a policy change should be adopted, it was beyond the scope of the Video Division's authority to implement the change. See Section 0.382(b)(1)(ii) of the rules.

C. The Video Division Made an Arbitrary Public Interest Determination Based on a Proposal that WRNN Never Intended To Implement.

10. Besides exceeding its delegated authority and misinterpreting the Commission's pronouncements, the Bureau acted contrary to the public interest. There can be no worse impact on WKOB-LP than the one that would result from WRNN's reallocation proposal. WKOB Communications, which bid over one million dollars to acquire a construction permit to survive on the only viable displacement channel left in the New York area, would be forced off the air. As a secondary service licensee, WKOB Communications was obviously aware of the risks

associated with operating a low power television station. This investment was made, however, in the good faith belief that the Commission would weigh the impact that any proposed digital reallocation would have on the WKOB-LP, pursuant to explicit policy that had been announced by the full Commission in a public proceeding. It was reasonable for WKOB-LP to rely on established policy. As WKOB Communications suggested in its pleadings in this proceeding, the impact of the Video Division's action is to completely destroy the value of any LPTV channel and to ensure that no applicant will ever confidently bid a dollar for an LPTV channel in the future.

11. It is critical to understand that no matter how high a place the implementation of DTV may hold as a matter of public policy, there is simply no public interest basis for destroying WKOB-LP, because there is no DTV benefit to the allotment change for WRNN. WRNN is not without a suitable DTV channel. As implemented by the construction permit applied for and granted to WRNN, there will actually be an increase in interference caused by the DTV reallocation to Channel 48. There will be no increase in service to any population except the population of the New York City area, which cannot be deemed to be underserved by any definition of that term. In other words, the purported benefits cited by the Video Division simply do not exist in real life, which is what the Commission must consider. In contrast, the loss of WKOB-LP's service to minority populations is a real life loss to people who do not have adequate alternatives.⁵

⁵ WKOB Communications' stockholder is of Korean descent, and the station has a long history of service to the Korean language community, which does not have a choice of multiple services.

12. In sum, any reasonable balancing of factors must come out in WKOB Communications' favor. WRNN is well-taken care of with its original Channel 21 DTV allotment. The purported benefits of a change to Channel 48 do not exist. On the other hand, the detriment to WKOB-LP is extinction. The contrast could not be more stark. By ignoring the actual facts, the Video Division acted arbitrarily and capriciously and must be reversed.⁶

CONCLUSION

13. The Video Division's decision stands for the proposition that if a full power station wishes to change its DTV allotment for any reason, its wish will be granted notwithstanding any adverse consequence to any LPTV station. That is not the law established by the Commission and is bad policy besides. Because the Video Division acted contrary to the policy of superior authority, relied on a change of policy which the Commission never made, and balanced the public interest considerations erroneously and on the basis of a proposal that WRNN never intended to implement, it must be reversed, and WRNN's DTV allotment must be restored to Channel 21.

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Respectfully submitted,



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August 28, 2002


⁶ See *Qwest Corporation v. FCC*, 248 F.3d 1191, 1998 (2002), citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 462 U.S. 29 (1983).

CERTIFICATE OF SERVICE

I, Donna L. Brown, hereby certify that on this 28th day of August, 2002, a copy of the foregoing "Application for Review" has been served via first-class United States mail, postage prepaid upon the following:

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